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**Klochko Equipment Rental Company, Inc. and Local 324, International Union of Operating Engineers (IUOE), AFL-CIO.** Case 07-CA-131088

September 26, 2014

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the Union on June 18, 2014, the General Counsel issued the complaint on July 1, 2014, and an amended complaint on July 17, 2014, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 07-RC-104929. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended answer admitting in part and denying in part the allegations in the complaint and amended complaint and asserting affirmative defenses.

On August 6, 2014, the General Counsel filed a Motion for Summary Judgment. On August 11, 2014, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain but contests the validity of the certification based on its positions that the Board improperly certified the Union as the exclusive collective-bargaining representative of its sole employee at its Saginaw, Michigan facility as part of the existing unit of mechanics and truckdrivers working at its Melvindale, Michigan facility and that the Union engaged in objectionable conduct that tainted the election.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine

the decisions made in the representation proceeding.<sup>1</sup> We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent has been a corporation with offices and places of business in Melvindale and Saginaw, Michigan (Melvindale and Saginaw facilities, respectively; collectively the Respondent's facilities), and has been engaged in the operation of a construction equipment rental and repair business.

During the calendar year ending December 31, 2013, the Respondent, in conducting its operations described above, purchased and received at the Respondent's facilities goods valued in excess of \$50,000 directly from points located outside the State of Michigan.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, Local 324, International Union of Operating Engineers (IUOE), AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Certification**

Following a July 25, 2013 self-determination election, on May 21, 2014, the Board issued a certification of representative, certifying that the Union may bargain for Brian Miller as part of the existing collective-bargaining

<sup>1</sup> The Respondent argues that the Board should deny the General Counsel's motion for summary judgment based on its recent decision in *Bergdorf Goodman*, 361 NLRB No. 11 (2014) (unit combining salespersons of women's shoes in two different departments is not appropriate), which issued after the conclusion of the representation proceedings here. The Respondent contends the Board's analysis in that case supports its argument that the unit certified in the underlying representation proceeding here is not appropriate, and maintains that the Board emphasized the importance of the frequency of interchange among employees in finding community of interest. We find no merit in this contention. Assuming arguendo that the Respondent has correctly characterized the Board's treatment of that factor in *Bergdorf Goodman*, we note that the Regional Director considered the degree of interchange between the Saginaw and Melvindale employees, along with other appropriate factors, in determining that a unit combining the Saginaw and Melvindale voting groups was appropriate. We note further, as did the Regional Director, that if the employee in the Saginaw voting group were not included in the unit, he would constitute a one-person residual unit and would be foreclosed from exercising his Sec. 7 right to representation. See, e.g., *Vecellio & Grogan*, 231 NLRB 136, 136-137 (1977); *Victor Industries Corp. of California*, 215 NLRB 48, 49 (1974).

unit of mechanics and truckdrivers working at the Employer's Melvindale, Michigan facility, which unit is currently represented by the Union.

Based on this certification, the following employees of the Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time lead mechanics, field service employees, welders, mechanics, utility persons, truck drivers and trainees employed by the Respondent at its facilities located at 2782 Corbin, Melvindale, Michigan and 1250 North Outer Drive, Saginaw, Michigan; but excluding all other employees, and supervisors and guards as defined in the Act.

#### *B. Refusal to Bargain*

About May 22, 2014, by email, the Union requested that the Respondent recognize it as the exclusive collective-bargaining representative of the voting group and bargain collectively with it as the exclusive collective-bargaining representative of the unit, specifically with respect to the voting group. Since about May 22, 2014, the Respondent has refused to do so.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing since May 22, 2014, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

#### ORDER

The National Labor Relations Board orders that the Respondent, Klochko Equipment Rental Company, Inc., Melvindale and Saginaw, Michigan, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 324, International Union of Operating Engineers

(IUOE), AFL-CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time lead mechanics, field service employees, welders, mechanics, utility persons, truck drivers and trainees employed by the Respondent at its facilities located at 2782 Corbin, Melvindale, Michigan and 1250 North Outer Drive, Saginaw, Michigan; but excluding all other employees, and supervisors and guards as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Melvindale and Saginaw, Michigan, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 22, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. September 26, 2014

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO as the exclusive collective-

bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time lead mechanics, field service employees, welders, mechanics, utility persons, truck drivers and trainees employed by the Respondent at its facilities located at 2782 Corbin, Melvindale, Michigan and 1250 North Outer Drive, Saginaw, Michigan; but excluding all other employees, and supervisors and guards as defined in the Act.

KLOTCHKO EQUIPMENT RENTAL CO.

The Board's decision can be found at [www.nlrb.gov/case/07-CA-131088](http://www.nlrb.gov/case/07-CA-131088) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

